No. 13043

IN THE

United States

Court of Appeals

for the Ninth Circuit

CHARLES R. NEIBAUER,

Appellant,

vs.

CAPTAIN MAX R. HARRIS, Commanding Officer, Montana Induction Center, Butte, Montana,

Appellee.

APPELLANT'S OPENING BRIEF

APPEAL FROM THE UNITED STATES DISTRICT COURT, FOR THE DISTRICT OF MONTANA

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INDEX

CASES CITED

TEXT BOOKS

STATUTES

REGULATIONS

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STATEMENT OF JURISDICTION

The basis for the jurisdiction of the District Court below in the case at bar and the jurisdiction of this Court to review the judgment or order of the lower court from which the Appellant appeals is based on the fact that the Appellant petitioned the court below for a Writ of Habeas Corpus seeking his release from the unlawful custody and restraint, within the District of Montana, of the Appellee, as Commanding Officer of the Montana Induction Center at Butte, Montana, acting under or by color of the authority of the United States, under and by virtue of a void and invalid selective service classification and order of induction, issued to the Appellant under the Selective Service Act of 1948 (50 App. U.S.C.A. 451 et seq.); that such custody and restraint was in violation of the Federal Constitution and the said statute. That the District Court had the power to grant a writ of habeas corpus under such a showing as made in Appellant's Petition for the writ (Tr. 3) is provided by 28 U.S.C.A. 2241.

The Writ having been issued, then discharged and the petition therefor dismissed by the District Court, this Court has jurisdiction on the appeal from the final order of the lower court under the provisions of 28 U.S.C.A. 2253. No certificate of probable cause is required because the detention complained of does not arise out of process issued by a State court.

STATEMENT OF THE CASE

The Appellant herein, Charles R. Neibauer, a registrant under the Selective Service Act of 1948, complied fully with the provisions of that law, the proclamation of the President of the United States promulgated in connection therewith, and the rules and regulations issued thereunder. Originally classified as II-C, entitling him to agricultural deferment, his local board reclassified him as I-A; his right to a personal hearing before the board thereon, despite proper request by himself and his father, was denied; he appealed said classification to the State Appeal board, which affirmed the local board's action without dissenting vote; he exhausted all the remedies provided by the Act; was ordered to report for induction; obeyed said order and reported to the Appellee herein at the Montana Induction Center; was examined as to his physical, moral and social standards, and accepted for service in the armed forces, and exhausted fully all his administrative remedies (Tr. 3-7). Then counsel for the appellant, at his request and direction, petitioned the lower court for a Writ of Habeas Corpus, which was issued and directed to the Appellee herein before Appellant's actual induction into the armed services. (Tr. 25). The writ was returnable on June 19, 1951. (Tr. 9-10).

Because the lower court was then engaged in a jury term, with a crowded calendar, and was prepared to leave immediately upon completion thereof, for the Judicial Conference of the Ninth Circuit,

and at the Court's suggestion and advice, counsel for the Petitioner contacted the United States Attorney, Dalton Pierson, Esq., counsel for the Appellee, and counsel for both parties entered into a stipulation in writing, signed by respective counsel, and filed with the Clerk of the lower court on the 18th day of June, 1951, to continue the hearing from the date scheduled to a day to be set by the Court. (Tr. 11).

Appellant's counsel relied completely on the said Stipulation, and proceeded to transact legal business in another part of the District considerably removed from the seat of the Court and his office. The Appellee made no formal return, as required by law (28 U.S.C.A. 2243). Altho some slight endeavor was made to contact appellant's counsel, without any actual or constructive notice to the appellant or his counsel, on the 19th day of June 1951, the Court proceeded to conduct an alleged hearing on the return of the Writ, called the Appellee as the Court's witness (sic), and without the presence of either appellant or his counsel, conducted the entire examination of the Appellee, while counsel for the Appellee sat there. Altho the Stipulation cited above was in the file and records before the court, and counsel for the Appellee had signed such stipulation, no mention was made of it, by either the court or Appellee's counsel. The latter did not call the Court's attention to it, nor did he make any motion to set it aside or modify it. Appellee testified that the Appellant had reported for induction; that he was notified by Ap-

pellant's counsel that a Writ had been applied for; that he postponed Appellant's actual induction for 24 hours; that the Writ was served on him the following day, and he did not therefore induct Petitioner. (Tr. 23, 24, 25). At the conclusion of the alleged hearing, the Court announced that the Writ of habeas corpus was discharged and the Petition of Appellant was dismissed, (Tr. 22, 23, 24, 25). The court made and entered its formal written Order on June 20, 1951. (Tr. 12, 13).

The lower court's order found and concluded:

> "that the petitioner was not, and is not now, a member of the Armed Forces of the United States and was not inducted into the Armed Forces of the United States, and it further appearing that the Petitioner herein was not on the date, or dates, set forth in his Petition for Writ of Habeas Corpus restrained of his liberty nor held in custody against his will by the respondent, Capt. Max R. Harris, nor by any other representative, or representatives, of the Armed Forces of the United States, or at all ----------" (Tr. 12).

Before the Appellant or his counsel could seek appropriate redress in the lower court, the court departed the district for the aforesaid Judicial Conference. Appellant then appealed to this Court from the Judgment or final order of the court below, on June 22, 1951. (Tr. 14).

QUESTIONS INVOLVED

1. Did the Court err in ignoring the Stipulation entered into between Counsel for both parties, reduced to writing and filed with the Clerk?

2. Did the Court err in proceeding to Hearing without actual or constructive notice to Appellant, in the face of the Stipulation, without seasonable affirmative application upon the part of Appellee to set it aside or modify it?

3. Did the court accord the Appellant due process of law, as provided by the Fifth and Fourteenth Amendments to the Federal Constitution and the statute (28 U.S.C.A. 2243) in denying Appellant his right to traverse Appellee's return, and to be heard on the issues of fact and law?

4. Did the court err in dissolving the writ and dismissing the Petition based on his finding and conclusion that Appellant was not a member of the Armed Forces of the United States, and had not been inducted into the military services?

5. Did the court err in his final order dissolving the Writ and dismissing the Petition based on his finding and conclusion, entered without Appellant's traverse to the return on the writ, and without hearing the Appellant's testimony and evidence on the allegations of his Petition which did allege unlawful restraint and custody, that the Appellant was not on the date or dates set forth in his Petition restrained of his liberty nor held in custody against his will by the Appellee, nor any other representative, or representatives, of the armed forces of the United States, or at all?

SPECIFICATION OF ERRORS—STATEMENT OF POINTS

From the final order of the lower court dissolving the Writ of Habeas Corpus issued by the court, and dismissing the Petition of the Appellant therefor, the Appellant, Petitioner below, appeals and specifies as error:

1. The trial court erred in proceeding to hear the above-entitled cause without any regard, and in fact, ignoring the Stipulation entered into and agreed upon by the Counsel for both parties herein, continuing said hearing to a day to be set by the Court, and which Stipulations are permitted under the rules of said Court; (Tr. 11, 22, 23).

2. The trial court erred in failing or refusing to determine whether Petitioner or his Attorney of record had actual or constructive notice that Stipulation of Counsel was to be disregarded and Hearing proceed as scheduled; (Tr. 22, 23).

3. The trial court erred in proceeding to hear the above-entitled cause in the absence of Petitioner or his Attorney of record, who relied upon Stipulation theretofore entered between Counsel for both parties, and who had no notice that hearing was to proceed at the time held; (Tr. 22, 23, 24, 25, 26).

4. The trial court erred in failing, in the furtherance of justice, in a matter involving Petitioner's liberty, to set hearing for another date, where proper hearing with all parties present, could have been had, without prejudice to either party and his rights; (Tr. 22).

5. The trial court erred in requiring and determining that Petitioner must be a member of the Armed Forces of the United States before Writ of Habeas Corpus will lie; (Tr. 12,13).

6. The trial court erred in finding and concluding that Petitioner must be a member of the Armed Forces of the United States before a Writ of Habeas Corpus will lie; (Tr. 12, 13).

7. The trial court erred in finding and concluding that Petitioner must be inducted into the Armed Forces of the United States before a Writ of Habeas Corpus will lie; (Tr. 12, 13).

8. The trial court erred in finding and concluding that the Petitioner herein was not on the date or dates set forth in his Petition for a Writ of Habeas Corpus, restrained of his liberty nor held in custody against his will by the Respondent herein nor by any other representative, or representatives, of the Armed Forces of the United States, or at all; (Tr. 12,13).

9. The trial court erred in ordering the dissolution of the Writ of Habeas Corpus, and in dismissing the Petition of the Petitioner for a Writ of Habeas Corpus herein. (Tr. 13).

ARGUMENT

With reference to the first error specified by Appellant, the record discloses an attitude upon the part of the Court and the counsel for the Appellee, which was undeterred by even ordinary considerations of

due process, and the requirements of dealing in good faith.

At the Court's own suggestion, Counsel for the Appellant and the Appellee entered into a Stipulation (Tr. 11) whereby they agreed that the Hearing set by the Court for the 19th day of June, 1951, was to be continued until a day to be set by the Court. That Stipulation was reduced to writing, signed by both parties, and filed with the Clerk of the Court below, on the 18th day of June, 1951. It was not a Stipulation as to the law in the case, or as to legal effects of the facts in the case, such as are not ordinarily permitted. Nevertheless, the Court and Counsel for the Appellee, both of whom knew that the Stipulation was filed and was in the record in the case, did not mention it, did not move to set it aside or modify, but completely ignored, disregarded and evaded it. (Tr. 22).

If the Court, who had advised Counsel for Appellant to seek an agreement, later changed its mind, or Counsel for the Appellee changed his mind, then the proper thing to do was to give Appellant proper notice that the Stipulation would not be honored but breached. Appellant will not belabor this tribunal with extended argument, but cites as authority the words of the Court of Appeals for the Fourth Circuit in the case of **Maryland Casualty Co. vs. Rickenbacker et al, 146 F. 2d 751,** to-wit:

> "Stipulations of attorneys made during a trial may not be disregarded."

Another case, where the Supreme Court of the State of Florida considered a similar situation, where counsel who desired relief against previous stipulation, had ignored and evaded the agreement entered into with opposing counsel, emphasizes the proper course which Appellee, and the Court here, should have pursued:

> "To obtain relief against stipulation, the regular course is not to ignore or attempt to evade it, but to make seasonable affirmative application to the Court by formal motion **on notice** and supported by affidavits for withdrawal or revocation." **Dunscombe v. Smith, 1950 So. 796, 139 Fla.** (Emphasis supplied).

Appellant submits, therefore, that the trial court erred as pointed out in his Specification No. 1, and the action of the Court in completely ignoring and disregarding the Stipulation, constituted manifest abuse, and prejudiced substantial rights of the Appellant as Petitioner below.

As to Specifications 2 and 3, Appellant merely calls the Court's attention to the Transcript of the Record, Pages 22 and 23. On Page 22 thereof the lower court calls the case, and Counsel for the Appellee, who on just the day previous had entered into and signed and filed with the Clerk of the lower court the Stipulation here involved, blandly notifies the Judge that, and I quote, from the transcript at that page:

> "Counsel for Neibauer (Appellant herein) doesn't appear to be present. We attempted to contact him yesterday, and we were informed by the girl in his office that he could be contacted either in the Mon-

tana Hotel, Kalispell, or the office of—I forgot the name of the attorney. Any how, we called the Montana Hotel. He didn't have a reservation there and wasn't registered there, and we called the office of the attorney, the number of which his girl had given us. He wasn't there and wasn't expected there."

Here there is no mention of the Stipulation; no attempt to set it aside; no explanation of why Counsel for the Appellee was attempting to contact Counsel for Neibauer; no notification to the girl in the Counsel's office why they were attempting to contact him; no notification even to her that the Stipulation was going to be disregarded and the hearing proceed as set. Certainly, no word or action from the Court on the Stipulation; and no attempt or attitude at even the slightest protection and preservation of the Appellant's rights and liberty of person which were at stake, and which would have been consonant with the sacred tradition which clothes the historic Writ of Habeas Corpus. Notwithstanding the agreement made and signed, notwithstanding that Appellant and his counsel had no notice, Counsel for the Appellee had the latter present in court, evidently with full pre-arrangement, and proceeds to notify the court that he is present, and the Court, not counsel for the Appellee, calls the Respondent (Appellee herein) or its witness, and proceeds to examine him while Counsel for Appellee sits almost as a spectator. There was naturally no cross examination, and Appellee's testimony was apparently swallowed whole. There was no formal return made by Appellee to the Writ as

required by statute (28 U.S.C.A. 2243), and the Court did not inquire into it, but presumably considered the Appellee's testimony as an informal return. It must be remembered here that the lower court did not issue an order to show cause to the Appellee why Petitioner's writ should not be granted, but the Court had actually issued a writ of Habeas Corpus directed at the Appellee, and Section 2243, Title 28 U.S.C.A. (See Appendix) delineates the procedure to be followed from thenceforth. Its provisions, following the issuance of the Writ, were not complied with by the Appellee or the lower court. In a few seconds, or minutes at most, Appellant's Writ was dissolved, his petition dismissed, and his liberty and freedom, which the Writ so jealously protects, taken away on the most scanty and vague testimony of only one party to the action. This we contend is reversible error.

We further insist that opposing counsel's completely inadequate attempt to contact this counsel does not constitute notice of any kind that the stipulation was to be brushed aside or ignored and the hearing proceed. The distances in the District of Montana, as this court well knows, are vast, and to call one hotel and one attorney's office in a town once, while counsel could have been on his way during a 250 mile trip and consider this sufficient to ignore the Stipulation made, falls far short of the notice required under the circumstances and the issues involved.

On Specification No. 4, Appellant herein lays great stress. It is here we contend that the court below failed to accord Appellant that due process of law required by the Fifth and Fourteenth Amendments to the Constitution of the United States, and commanded by the statute (28 U.S.C.A. 2243). The United States Supreme Court in the leading case on this subject, **Walker vs. Johnston, 312 U. S. 275** has spoken out clearly in this regard. If the Appellee, Captain Harris' testimony at the purported hearing held by the lower court is to be considered, it constitutes a verbal, informal return to the writ which the court duly and properly issued, but it serves only to make the issues which must be resolved by evidence taken in the usual way. It can have no other office. He should be subjected to examination ore tenus or by deposition as are all other witnesses. On the basis of Appellant's Petition for the writ alleging unlawful restraint and custody by the Appellee, and on the record, it was Appellant's right to be heard. In **Walker vs. Johnston,** supra, the Supreme Court said:

> "The only admissible practice, ..., was to have the Petitioner produced, and hold a hearing at which evidence is received. Nothing less will satisfy the command of the statute, (28 U. S. C. A. 2243) that the court shall hear and determine the facts."

This Court has expounded the same doctrine in **O'Keith vs Johnston, Warden, (CCA 9th) 122 F. 2d 554,** and it has also been followed in Dorsey v. Gill, 148 F. 2d 857.

Perhaps the case closest in point is that of **Ex parte Rosier, 133 F. 2d 316,** decided by the District of Columbia Court of Appeals. There the Court in summarizing Walker vs. Johnston, supra, stated:

> "(1) A Petitioner cannot be denied the opportunity to prove the truth of the allegations he makes, if those allegations if true, entitle him as a matter of law to release from restraint. (2) No controversial issue of fact arising under a Petition for a writ of Habeas Corpus, return and traverse can be determined except after a hearing ore tenus or upon depositions.

In that case as here, the lower court accepted the testimony of the Respondent and denied the Petitioner's writ without a hearing, and the appellate court condemned such action in the strongest language as having done violence to the nature of the writ historically and as not in consonance with our jurisprudence and with the due process clause of the Fifth Amendment to the Constitution. It said:

> "The right of hearing under the due process clause includes the right of each party to a cause to introduce evidence in support of his claim or defense, to hear the evidence introduced against him, to test the same by cross-examination, the right that nothing shall be treated as evidence which is not introduced as such, and the right to make argument on questions of both law and fact."

In an early case, the United States Supreme Court, in deciding an appeal similar to the one before us, condemned in bitter tones the denial of hearing and due process to the Petitioner as here:

"It is a rule as old as the law ....., that no one shall be personally bound until he has had his day in court, by which is meant, until he has been duly cited to appear, and has been afforded an opportunity to be heard. **Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression and can never be upheld where justice is justly administered."**
(Emphasis supplied.)

Galpin v. Page, 18 Wall. 350, 368
21 L. Ed. 959

It is the contention of Appellant that the trial court erred in failing to accord the Appellant a hearing in respect to the allegations of his Petition. He was given no opportunity to traverse the assertions of the Respondent. He was not even apprized of them. But the Appellant's Petition and the Appellee's testimony in the alleged hearing held by the lower court, considered together, raised issues of facts, that should under the statute be determined by the court after hearing. The determination actually reached by the court below was reached without a proper hearing or no hearing at all. The necessity for hearing cannot be escaped under the law of the land.

"He who decides anything, one party being unheard, though he should decide right, does wrong."
6 Co. 52; 4 Bla. Com. 483 (Emphasis supplied.)

We submit therefore that Appellant herein was denied due process of law under the federal constitution and the statute applicable, and the judgment of the lower court should be reversed and remanded for proper hearing and procedure.

Appellant combines his argument under Specifications of error Nos. 5, 6, and 7. It should be made clear, because the lower court was apparently confused on this point, that Appellant's Writ of Habeas Corpus was directed at the Appellee, not in his **military** role as an officer of the United States Armed Forces, but in his **civil** role in the administration of selective service, which is a system integrating both the civil and military authorities, and the latter perform a civil function therein:

Billings vs Truesdell, 321 U. S. 546

It is now clearly settled law that actual induction into the armed forces of the United States is not required before habeas corpus will lie, as the United States Supreme Court and this Court have pointed out time and time again:

Estep vs. U. S. 327 U. S. 114-146,
See particularly the concurring opinions of Justices Murphy and Rutledge.

Gibson vs. U. S. 329 U. S. 338 at 357, 358

Sanders vs. U. S. (CCA 9th) 154 F. 2d. 873, 874

Japanese Internment Cases, (CCA 9th) 156 F. 2d 441

Lawrence vs. Yost (CCA 9th) 157 F. 2d 44

The Appellant here had exhausted his administrative remedies; he had reported to the Induction center (Tr. 22, 23, 24), had been accepted by the military, (Tr. 22) but had not actually been inducted (Tr. 25.)

We submit therefore that it was not necessary for the Appellant to be a member of the Armed Forces, or to have been inducted into the Armed Forces in

order for a writ to lie, and to be directed at the Appellee in his civilian role in the selective service administration, and that the court below erred in finding and concluding to the contrary. We insist that such error was prejudicial and constitutes grounds for reversal.

On Specification of error No. 8, the trial court erred in finding and concluding that the Appellant was not on the date or dates set forth in his Petition for a Writ of Habeas Corpus, restrained of his liberty nor held in custody against his will by the Appellee, nor by any other representative, or representatives of the Armed Forces of the United States, or at all. Appellant's Petition for the Writ did affirmatively allege that the Appellee was wrongfully restraining appellant of his liberty and holding him in wrongful custody at the date alleged in the petition (Tr. 7). Appellee attempts to controvert this at the alleged hearing held. (Tr. 25) This of course merely puts the fact at issue, and Appellant under Section 2243, 28 U. S. C. A. was entitled to deny any of the facts set forth in this testimony or allege any other material facts, if the lower court had not erroneously dissolved the writ and dismissed the petition, and denied Appellant his rightful hearing.

As pointed out before, the lower court was apparently confused and had the impression that Appellant pursued his writ in order to remove himself from the military jurisdiction and control of the Appellee. Appellant was not a member of the Armed Forces and

he had not been inducted into the Armed Forces and he did not want to be. This was expressly what he was trying to prevent because of his invalid classification and void order for induction. He directed his writ at the Appellee in the civil role which the Appellee was playing in the integrated administrative process of selective service, and the unlawful, wrongful restraint, control and custody of the Appellant while performing that **civil** function, and at the same time Appellant remained in the **civil jurisdiction** of his local selective service board, and would not come under military jurisdiction until actually inducted into the Armed Forces voluntarily. Billings vs. Truesdell, 321 U. S. 542.

That Appellant was actually restrained of his liberty is evidenced clearly by the last sentence of testimony of the Appellee in the abortive hearing held in the lower court:

> "Captain Harris: Only the writ of habeas corpus allowed me to let him go at it was. (Tr. 26.)

Appellant was compelled to report to the Appellee, as Commanding officer of the Induction Center, by process issued in the name of the President of the United States. He could only refuse to obey under compulsion of committing a crime against the federal government. If the lower court had not issued its writ, he would have been compelled to go into the military service, or commit a crime by refusing to do so. Altho Appellee permitted him to go home, largely because he had no place to imprison him, he had no

right to do so. He is enlarged now solely by virtue of the Stay of Execution granted by another District Judge of the District of Montana, pending this appeal. (Tr. 16) His order to report for induction, under Selective Service Regulations is a continuing order from day to day. (Selective Service Regulation Sec. 1642.2) It is inoperative only because of the Stay of Execution. The restraint here of the Appellant was sufficient to warrant issuance of the writ:

U. S. vs. Graham, 57 F. S. 938 at page 941

The restraint here which precluded freedom of action is sufficient notwithstanding the lack of confinement in a jail or prison:

25 Am. Jur. 158, Note 9, cases cited

The restraint of the Appellant was certainly involuntary, and there was a duress or restraint of the Appellant whereby he was prevented from exercising the liberty of going when and where he pleased:

Ex parte Foster, 71 SW 593, 44 Tex. Crim. Reports 423

The Appellant was compelled to keep in touch with the Appellee at all times; if he refused, he would have committed a crime, and subjected himself to prosecution, conviction, and possible imprisonment.

If the trial court's finding and conclusion is correct, then the opinion of this court and the United States Supreme Court in the Estep, Gibson, Sanders and other cases is nullified and rendered worthless, except for those selective service registrants who exhaust all of their administrative remedy, and then

commit the crime of refusing to be inducted, and are arrested and detained therefor. Certainly this was not the intention of this Court or the Supreme Court; there is sufficient restraint and custody to satisfy the requirements of the writ, when one reports to the induction center, and is under the orders and the custody of the Commanding Officer, and his representatives, in their civil role in that process, and has been accepted for military service, and is subject to induction, or must commit a crime. We contend that the Appellant was sufficiently unlawfully restrained and detained in wrongful custody to entitle him to the issuance of the writ and to release from that unlawful restraint and wrongful custody, and that that restraint was involuntary. We asseverate that the trial court erred in holding to the contrary, and its ruling should be reversed.

Appellants Specification No. 9 is based upon the argument and the authority cited therefor under each and every one of the other eight specifications.

CONCLUSION

This appeal is made in the utmost good faith. The Appellant has suffered a gross injustice at the hands of his local selective service board; the law of the land has been subverted by that board to serve selfish and unconscionable ends, which are not at issue in this appeal, but which should have been heard in the lower court. The action of the lower court in its denial of elementary due process and its incredible flaunting

of the tradition of his great writ; the inexplicable disregard and evasion of Stipulation made between the parties to this action, and on which Appellant relied rightfully; all these were a manifest abuse of discretion and prejudicial and reversible error. The federal courts are held to a much higher order of procedure in taking away a man's liberty than the arbitrary and capricious manner in which the court below dissolved the writ it had issued, and dismissed Appellant's Petition. We submit that the judgment and final order of the lower court should be reversed, and the case remanded to be heard according to the law and in accordance with the decision of this Court.

Respectfully submitted,

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APPENDIX

28 U. S. C. A. 2243. Issuance of writ; return; hearing; decision.

A court, justice, or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed.

The person to whom the writ or order is directed shall make a return certifying the true cause of the detention.

When the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed.

Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.

The applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts.

The return and all suggestions made against it may be amended, by leave of the court, before or after being filed.

The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require. June 25, 1948, c. 646, 62 Stat. 965

Selective Service Regulations, Sec. 1642.2—Continuing duty. When it becomes the duty of a registrant or other person to perform an act or furnish information to a local board or other office or agency of the Selective Service System, the duty or obligation shall be a continuing duty or obligation from day to day and the failure to properly perform the act or the supplying of incorrect or false information shall in no way operate as a waiver of that continuing duty.